STATE OF MICHIGAN

COURT OF APPEALS

JON JENKINS,

Plaintiff-Appellee,

v

CHARLES KOESTER,

Defendant,

and

FARM BUREAU INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 28, 2007

No. 268175
Genesee Circuit Court
LC No. 04-078388-NI

Before: Davis, P.J., and Schuette and Borrello, JJ.

SCHUETTE, J. (*concurring in part and dissenting in part*).

I concur in the portion of the majority opinion that affirms the trial court's determination that the incident at issue in this case—Koester shooting Jenkins in the eye with a paintball gun—was a covered occurrence. However, because I believe that the shooting falls within the intentional-act exclusion of the policy, I must respectfully dissent from the portion of the majority opinion affirming the trial court's decision to the contrary.

Clear and unambiguous exclusionary clauses must be enforced as written. *Century Surety Co v Charron*, 230 Mich App 79, 83; 583 NW2d 486 (1998). Further,

> [e]xclusionary clauses in insurance policies are strictly construed in favor of the insured. Coverage under a policy is lost if any exclusion in the policy applies to an insured's particular claims. Clear and specific exclusions must be given effect because an insurance company cannot be liable for a risk it did not assume. [*Hayley v Allstate Ins Co*, 262 Mich App 571, 574; 686 NW2d 273 (2004), quoting *Century Surety Co*, *supra* at 83.]

Here, the intentional-act exclusion stated that the personal liability coverage did not apply to

> bodily injury or property damage which may be the natural, foreseeable, expected, or anticipated result of the intentional acts of one or more insureds or which in fact is intended by one or more insureds, even if the resulting bodily injury or property damage is of a different kind, quality, or degree than initially intended, or is sustained by a different person, entity, or real or personal property than initially expected or intended.

The parties agree that Koester's act of shooting was intentional. Given that the act was intentional, the key inquiry here is whether, under the terms of the exclusion, plaintiff's injuries were "the natural, foreseeable, expected, or anticipated result" of the shooting. The majority concludes that this Court should apply a subjective standard unless the policy explicitly incorporates an objective standard. I disagree for two reasons.

First, the majority's interpretation makes the exclusion superfluous because the exclusion would have the same meaning as the underlying coverage provision. The majority asks this Court to affix the "standpoint of the insured" clause to the intentional-act exclusion. To do so would be to render the terms "foreseeable" and "expected" meaningless, thereby narrowing the exclusion to those injuries subjectively intended by the insured. This Court must construe insurance provisions to give meaning to all of the contract terms in context. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 356-357; 596 NW2d 190 (1999).

Second, the majority's interpretation is contrary to the line of cases holding that the term "expected" incorporates an objective standard into exclusionary clauses. In *State Farm Fire & Cas Co v Jenkins*, 147 Mich App 462, 382 NW2d 796 (1985), this Court explained that

> where a policy excludes coverage for intended *or* expected injuries, a distinction should be drawn between the terms "intentional" and "expected[.]" In order to avoid liability for an expected injury, it must be shown that the injury was the natural, foreseeable, expected, and anticipatory result of an intentional act. [*Id*. at 467-468 (emphasis in original).]

Similarly, in *Allstate Ins Co v Maloney*, 174 Mich App 263, 265; 435 NW2d 448 (1988), this Court examined a policy that excluded coverage for "expected" injuries, and used an objective standard to determine whether the exclusion applied. The incident in *Maloney* involved the intentional firing of a shotgun, without proof of intent to hit or injure anyone. *Id.* at 265-266. The Court noted that the policy excluded coverage for "expected" results, and stated that the exclusion applied to injuries that are "the natural, foreseeable, expected and anticipatory result of an intentional act." *Id*. at 267. The Court concluded that the plaintiff's injuries "could reasonably be expected to result from [the insured's] intentional act of shooting a shotgun in the area where [the plaintiff] was located. Even if [the insured] did not intend to injure, or even hit [the plaintiff], [the] injuries were nevertheless the natural, foreseeable, expected and anticipatory result of [the insured's] act." *Id*.

Likewise, in *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 384; 565 NW2d 839 (1997), our Supreme Court considered whether an intentional-act exclusion relieved the insurer of the duty to defend the insured in an action arising from a self-defense shooting. The exclusion in *Harrington* barred coverage for "bodily injury or property damage 'expected or intended by an insured person.'" *Id*. at 378. The *Harrington* Court noted that the terms of the exclusion required "a subjective inquiry into the intent or *expectation* of the insured." *Id*. at 383 (emphasis in original). The Court went on to explain that these terms barred coverage for "injuries caused by an insured who acted intentionally despite his awareness that harm was likely to follow from his conduct." *Id*. at 384. The Court then held that the exclusion barred coverage of the shooting. *Id*.

If the intentional-act exclusion in *Harrington* barred coverage for a shooting injury that was expected by the insured, the exclusion here must bar coverage for the shooting injury that was foreseeable. A reasonable person would have foreseen that firing an automatic paintball gun in the direction of another person could result in serious injury, particularly if the shooter and the other person are only 10 to 15 feet apart.

In this way, the injuries here are wholly distinct from the injury our Supreme Court addressed in *Allstate Ins Co v McCarn* (*After Remand*), 471 Mich 283; 683 NW2d 656 (2004) (*McCarn II*). In *McCarn II*, a plurality of our Supreme Court determined that the shooting at issue was not excluded by the policy because the shooter believed that the gun was unloaded and as such believed the gun could not fire. *Id.* at 291. Here, in contrast, Koester knew that his paintball gun was loaded, and knew he was firing toward plaintiff. Koester stated, "I was just shooting the paint ball by him to make him think I was going to hit him." As in *Harrington*, Koester's intentional act of shooting a loaded weapon in the direction of another resulted in a foreseeable injury, and as such was excluded by the policy.

Accordingly, because I believe that the shooting falls within the intentional-act exclusion of the policy, I would reverse the portion of the trial court's decision holding that the exclusion does not apply.

/s/ Bill Schuette